

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LOLETHA D. HALE and U.S. POSTAL SERVICE,
POST OFFICE, Duluth, GA

*Docket No. 02-1877; Submitted on the Record;
Issued February 12, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

In this case, the Office accepted that on April 24, 1993 appellant sustained an aggravation of bilateral carpal tunnel syndrome. By decision dated September 20, 1999, the Office terminated appellant's entitlement for wage loss, as well as compensation for permanent impairment to a schedule member under section 8106(c)(2) on the basis that appellant rejected a suitable offer of employment.

On September 18, 2000 appellant filed a request for reconsideration and submitted new evidence. By decision dated October 6, 2000, the Office denied modification of its previous decision finding the new evidence and arguments insufficient.

On March 4, 2002 appellant filed a "[s]upplement to [p]etition for [r]econsideration." A January 23, 2002 letter from Kaiser Permanente regarding appellant's treatment from July 16, 1992 through May 22, 1998 was received along with treatment notes. By decision dated April 8, 2002, the Office denied appellant's request for reconsideration as untimely filed and failing to demonstrate clear evidence of error.

The only Office decision before the Board on this appeal is the April 8, 2002 decision denying appellant's request for reconsideration. More than one year has elapsed between the date of the Office's most recent merit decision on October 6, 2000 which denied appellant's request for modification of its September 20, 1999 decision, terminating appellant's compensation benefits on the basis that suitable employment was refused and the filing of

appellant's appeal on July 5, 2002. The Board lacks jurisdiction to review the merits of appellant's claim.¹

The Board finds that the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.² The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).³

The Office properly found in its April 8, 2002 decision that the one-year time limit for filing a request for reconsideration of the Office's October 6, 2000 decision expired on October 7, 2000 and that the request for reconsideration dated March 4, 2002 was untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁴ Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁵

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁶ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁷ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ This entails a limited review by the Office of

¹ 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one-year of the date of the Office's final decision being appealed.

² 20 C.F.R. § 10.607(a).

³ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

⁶ *Dean D. Beets*, 43 ECAB 1153 (1992).

⁷ *Leona N. Travis*, 43 ECAB 227 (1991).

⁸ *Jesus D. Sanchez*, *supra* note 3

⁹ *Leona N. Travis*, *supra* note 7.

how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.¹⁰

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.¹¹ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹²

In support of her request for reconsideration, appellant submitted a January 23, 2002 medical note from Kaiser Permanente dated January 23, 2002, which advised that appellant was seen and treated with medication from July 16, 1992 through May 22, 1998 for a recurrent major depressive disorder. Treatment notes reflected appellant's progress concerning her upper extremity symptoms. The Board notes that appellant's compensation benefits were terminated on the basis that she rejected suitable employment. The information appellant submitted is properly considered irrelevant or immaterial in nature as it has no bearing or is inconsequential to the issue in question. Since the evidence appellant submitted with her request does not establish that the Office committed an error in its October 6, 2000 decision, it is insufficient to establish clear evidence of error.

As appellant's request for reconsideration was untimely filed and did not establish clear evidence of error, the Office properly denied it.¹³

¹⁰ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹¹ *Leon D. Faidley, Jr.*, *supra* note 3.

¹² *Gregory Griffin*, *supra* note 4.

¹³ On appeal appellant stated that on November 11, 2001 she had requested reconsideration of the Office's October 6, 2000 decision and had submitted evidence in support of her reconsideration request. She advised the Office never addressed either her reconsideration request of November 11, 2001 or the supporting evidence. Appellant submitted a copy of a certified mail, return receipt (request number 7000-1670-0005-1178-9172) addressed to the Office, which reflects the package was signed for on November 19, 2001. Also submitted with her appeal was additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c). This decision does not preclude appellant from submitting new evidence to the Office and request reconsideration pursuant to 5 U.S.C. § 8128(a).

The April 8, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
February 12, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member